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BOUSTEAD HOTELS & RESORT SDN BHD v. BASIAH JAAFAR & ORS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
B VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: W-01(W)-23-01-2015]
16 JUNE 2016

C ***CIVIL PROCEDURE:*** *Parties – Joinder – Appellant took over liability of wound up employer company – Appellant joined as party to proceedings by employee at Industrial Court – Whether decision binding and effective upon appellant – Whether nexus between employee and appellant established – Industrial Relations Act 1967, ss. 29(a), 32(1)(a)*

D ***LABOUR LAW:*** *Employment – Dismissal – Constructive dismissal – Whether established – Claim for back wages and reinstatement – Whether claimant could introduce evidence of her last drawn salary – Whether Industrial Court correct in awarding 12 months back wages – Claimant aged 58 when final award handed down – Whether claimant eligible to be reinstated – Whether award for compensation in lieu of reinstatement ought to be quashed*

E

The first respondent was an employee of the second respondent as an Executive Housekeeper. In early 2007, pursuant to a disciplinary action against the first respondent, a domestic inquiry was convened after which she was found guilty, suspended from work for 14 days without pay and was given a warning. Subsequently, the Housekeeping Department was split into F two divisions and the first respondent was redesignated to head the administrative division. Dissatisfied with the decision of the domestic inquiry and the subsequent developments, the first respondent considered herself to have been constructively dismissed by the second respondent and filed a representation at the Industrial Relations Department. The matter was G later referred to the Industrial Court ('third respondent') for determination under s. 20(3) of the Industrial Relations Act 1967 ('IRA'). The first respondent claimed for reinstatement without any loss of wages, allowances, service, seniority, privileges or benefits. When it was found that the second respondent ceased to be in business, the first respondent applied for the H appellant to be joined as a party to the proceedings pursuant to s. 29(a) of the IRA. The application was allowed under the interim award. The appellant's application for judicial review of the interim award was dismissed by the High Court and the appellant did not appeal against the decision. In the final award, the first respondent was awarded compensation *in lieu* of I reinstatement and 12 months back wages of RM60,000 to be borne by the appellant and the second respondent. The appellant's application for judicial review of the final award was dismissed by the High Court and hence, this appeal.

Held (allowing appellant's appeal in part)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The first respondent had established the elements of constructive dismissal before the third respondent which was not challenged by the appellant. The interim award, which allowed the first respondent's application to join the appellant as a party to the reference, was affirmed by the High Court and offered a finality to the issue as no further appeal was mounted by the appellant. By virtue of s. 32(1)(a) of the IRA, the interim award was binding and effective upon the appellant. Hence, it was no longer a competent issue to be reventilated during the hearing of the said reference before the third respondent. (paras 19, 25, 27 & 28)

(2) The third respondent had properly identified the proper parties necessary to be made parties in the proceedings in order to come to an effective and enforceable award. The appellant was joined as a party pursuant to the letter of 25 May 2009 wherein the appellant had clearly admitted that they had taken over liability of the second respondent's employees effective 26 May 2009, *ie*, the cut off date. Although the first respondent considered herself to have been constructively dismissed on 10 March 2007, on the cut off date, her case was still pending before the Industrial Court and her claim for constructive dismissal had yet to be determined by the Industrial Court. Verily, the first respondent had established her nexus with the appellant. (para 30)

(3) Although the official receiver, who had been appointed as liquidator of the second respondent, had taken the stand not to contest the first respondent's claim, it did not absolve the appellant's liability as the third respondent had ruled that the appellant should be joined as a party to the proceedings and hence, both the second respondent and the appellant were to be jointly liable to satisfy any award handed down against any of them. Additionally, the appellant did not appeal against the order of the High Court in the judicial review application affirming the decision to join the appellant as a party to the reference. As such, the order remained valid and effective. The second respondent's admission or its absence was not an issue capable of invalidating the final award. (paras 34 & 35)

(4) The first respondent had pleaded in her statement of case that she should be reinstated in her former position without, amongst others, any loss of salary. In such event, the first respondent was entitled to introduce evidence of her last drawn salary ('exh. CL2'). Further, exh. CL2 could not have been an afterthought as it was dated 1 October 2002, long before she considered herself to have been constructively dismissed. (para 37)

(5) The third respondent had acted in accordance with para. 1 of the Second Schedule of s. 30(6A) of the IRA which provides that back wages shall not exceed 24 months. The first respondent earned RM5,000 per month prior to her dismissal and had 24 months to go before her dismissal. Since the first respondent had established constructive dismissal, the third respondent was correct in awarding 12 months back wages. There was a reduction of 50% from the back wages, *ie* maximum allowed under Practice Note No. 1 of 1987. The quantum of the award being the most reasonable, there was no error in allowing the claim for back wages. (paras 47-50)

(6) The appellant's appeal in respect of the award for compensation *in lieu* of reinstatement was allowed and the award was quashed. The first respondent could not be reinstated due to her age, which was 58 at the time the final award was handed down, and hence was not eligible to be reinstated in the first place. (paras 42, 43 & 45)

Bahasa Malaysia *Headnotes*

Responden pertama adalah pekerja responden kedua sebagai Ketua Jurukemas. Pada awal 2007, berikutan tindakan tatatertib terhadap responden pertama, satu siasatan dalaman dimulakan di mana dia didapati bersalah, digantung kerja selama 14 hari tanpa gaji dan diberikan amaran. Kemudian, Jabatan Jurukemas dibahagikan kepada dua bahagian dan responden pertama dilantik mengetuai bahagian pentadbiran. Tidak berpuas hati dengan keputusan siasatan dalaman dan perkembangan selepas itu, responden pertama menganggap dirinya dibuang kerja secara konstruktif oleh responden kedua dan memfailkan rujukan di Jabatan Perhubungan Perusahaan. Perkara tersebut kemudian dirujuk kepada Mahkamah Perusahaan ('responden ketiga') bagi penentuan di bawah s. 20(3) Akta Perhubungan Perusahaan 1967 ('Akta'). Responden pertama menuntut pengembalian kerja tanpa apa-apa kehilangan gaji, elaun-elaun, perkhidmatan, senioriti, keistimewaan dan faedah-faedah. Apabila didapati bahawa responden kedua berhenti daripada menjalankan perniagaannya, responden pertama memohon perayu dimasukkan sebagai pihak kepada prosiding menurut s. 29(a) Akta. Permohonan tersebut dibenarkan di bawah award interim. Permohonan perayu bagi semakan kehakiman award interim ditolak oleh Mahkamah Tinggi dan perayu tidak merayu terhadap keputusan tersebut. Dalam award muktamad, responden pertama diawardkan pampasan sebagai ganti pengembalian kerja dan 12 bulan gaji kebelakangan sejumlah RM60,000 dibayar oleh perayu dan responden kedua. Permohonan perayu untuk semakan kehakiman award muktamad ditolak oleh Mahkamah Tinggi dan dengan itu, rayuan ini.

Diputuskan (membenarkan sebahagian rayuan perayu)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Responden pertama telah membuktikan elemen-elemen pembuangan kerja secara konstruktif di hadapan responden ketiga yang tidak dicabar oleh perayu. Award interim yang membenarkan permohonan responden pertama untuk memasukkan perayu sebagai pihak kepada rujukan, disahkan oleh Mahkamah Tinggi dan memberikan kemuktamadan kepada isu tersebut kerana tiada rayuan lanjut dibuat oleh perayu. Melalui s. 32(1)(a) Akta, award interim adalah mengikat dan berkuat kuasa terhadap perayu. Dengan itu, isu tersebut tidak lagi kompeten untuk dibicarakan semasa perbicaraan rujukan tersebut di hadapan responden ketiga.

(2) Responden ketiga mengenal pasti dengan sewajarnya pihak-pihak yang perlu dijadikan pihak dalam prosiding untuk memberikan award yang berkuat kuasa dan boleh dilaksanakan. Perayu dimasukkan sebagai salah satu pihak menurut surat bertarikh 25 Mei 2009 di mana perayu jelas mengakui mereka telah mengambil alih liabiliti responden kedua berkuat kuasa 26 Mei 2009, iaitu, tarikh luput. Walaupun responden pertama menganggap dirinya dibuang kerja secara konstruktif pada 10 Mac 2007, pada tarikh luput, kesnya masih belum diputuskan di Mahkamah Perusahaan dan tuntutannya untuk pembuangan kerja secara konstruktif belum diputuskan oleh Mahkamah Perusahaan. Dengan itu, responden pertama telah membuktikan hubungannya dengan perayu.

(3) Walaupun pegawai penerima, yang dilantik sebagai pelikuidasi responden kedua, mengambil kedudukan untuk tidak mempertikaikan tuntutan responden pertama, ia tidak membebaskan liabiliti perayu kerana responden ketiga telah memutuskan bahawa perayu sepatutnya dimasukkan sebagai pihak kepada prosiding dan dengan itu, kedua-dua responden kedua dan perayu adalah bertanggungan secara bersama untuk memenuhi apa-apa award yang diberikan terhadap mana-mana daripada mereka. Tambahan lagi, perayu tidak merayu terhadap perintah Mahkamah Tinggi dalam permohonan semakan kehakiman mengesahkan keputusan memasukkan perayu sebagai pihak kepada rujukan tersebut. Oleh itu, perintah tersebut kekal sah dan berkuat kuasa. Pengakuan responden kedua atau ketiadaannya bukan isu yang boleh membatalkan award muktamad.

(4) Responden pertama memplidkan dalam kenyataan kesnya bahawa dia sepatutnya dikembalikan semula kepada kedudukan sebelumnya tanpa, antara lain, apa-apa kehilangan gaji. Dalam keadaan tersebut, responden pertama berhak untuk memperkenalkan keterangan gaji terakhirnya ('eks. CL2'). Selanjutnya, eks. CL2 bukan satu fikiran terkemudian kerana ia bertarikh 1 Oktober 2002, lama sebelum dia menganggap dirinya dibuang kerja secara konstruktif.

(5) Responden ketiga bertindak menurut perenggan 1 Jadual Kedua s. 30(6A) Akta yang memperuntukkan bahawa gaji kebelakang tidak boleh melebihi 24 bulan. Responden pertama memperoleh RM5,000 sebulan sebelum pembuangan kerjanya dan masih ada 24 bulan lagi sebelum pembuangan kerjanya. Oleh sebab responden pertama telah membuktikan pembuangan kerja secara konstruktif, responden ketiga betul dalam mengawardkan gaji kebelakang 12 bulan. Terdapat pengurangan 50% daripada gaji kebelakang iaitu jumlah maksimum yang dibenarkan di bawah Arahan Amalan No. 1 Tahun 1987. Kuantum award adalah amat munasabah dan dengan itu, tiada kekhilafan dalam membenarkan tuntutan gaji kebelakang.

(6) Rayuan perayu berkaitan award bagi pampasan sebagai ganti pengembalian semula dibenarkan dan award adalah dibatalkan. Responden pertama tidak boleh kembali bekerja kerana umurnya yang telah mencapai 58 tahun pada masa award muktamad diberikan, dan dengan itu, tidak berhak kepada pengembalian kerja.

Case(s) referred to:

Co-operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals [2004] 1 CLJ 849 CA ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

Unilever (M) Holdings Sdn Bhd v. So Lai & Anor [2015] 3 CLJ 900 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(3), 29(a), 30(5), (6), (6A), 32(1)(a), Second Schedule para. 1

For the appellant - Fahri Azzat; M/s Azzat & Izzat

For the 1st respondent - Ravindra Murugavell; M/s Murugavell Arumugam & Co

[Editor's note: For the High Court judgment, please see Boustead Hotels & Resort Sdn Bhd v. Basiah Jaafar & Ors [2015] 1 LNS 425 (overruled in part).]

Reported by S Barathi

JUDGMENT

Ahmadi Asnawi JCA:

[1] This is an appeal by the appellant against the decision of the High Court at Kuala Lumpur on 15 December 2014 in dismissing the appellant's judicial review application against the Final Award No. 1704/2013 dated 16 October 2013 ("final award") in the Industrial Court Reference No. 7/4/1905/07.

[2] The appellant had sought the following reliefs in their application for judicial review:

(i) an order for *certiorari* to quash the aforesaid final award; and/or

(ii) in the alternative, a declaration that the said final award was null, void and could not be enforced as it was tainted with procedural impropriety, irrationality and disproportionate and/or *ultra vires* s. 30(5) and/or s. 29 of the Industrial Relations Act 1967 (Act 177) (hereinafter referred to as "the IRA 1967"); and

(iii) costs.

The Brief Background Facts

[3] The first respondent was an employee of the second respondent. Her last designation was as an Executive Housekeeper at Royal Adelphi Seremban, effective 1 July 1999 earning about RM5,000 per month.

[4] In early 2007, disciplinary action was taken against the first respondent. A domestic inquiry was convened and the first respondent was found guilty of the charges levelled against her. She was suspended from work for 14 days with no pay plus a warning.

[5] Subsequently, the Housekeeping Department was split into two divisions, namely the administrative and operations divisions. The first respondent was redesignated to head the administrative division.

[6] Dissatisfied with the decision of the domestic inquiry and the subsequent developments that followed suit, the first respondent considered herself to have been constructively dismissed on 10 March 2007 by the second respondent. The first respondent then filed a representation with the Industrial Relations Department for determination. The matter could not be resolved at the conciliation stage and was then referred to the Industrial Court for determination by the Honourable Minister of Human Resources under s. 20(3) of the IRA 1967. The case was then registered at the Industrial Court on 24 September 2007 *vide* Industrial Court Reference No. 7/4-1905/07.

[7] The first respondent claimed for reinstatement without any loss of wages, allowances, service, seniority, privileges or benefits.

[8] The first respondent later discovered that the second respondent had ceased to be in business. Thereafter the first respondent applied for the appellant to be joined as a party to the proceeding pursuant to s. 29(a) of the IRA 1967.

[9] The application was granted by the third respondent on 11 July 2012 under Interim Award No. 949 Tahun 2012 ("interim award"). The full purport and grounds of the third respondent is at pp. 158 to 163, bahagian C, jilid III, rekod rayuan ("RR").

[10] The appellant later sought for the interim award to be judicially reviewed on the ground that there was absolutely no nexus between the appellant and the second respondent that could render any award in respect of the first respondent's claim to be effective and enforceable against the

appellant. The High Court dismissed the appellant's judicial review application on 29 January 2013. The said order of the High Court is at pp. 295-296, bahagian C, jilid III, RR. The appellant made no further appeal to the Court of Appeal against the said dismissal. These facts were not disputed by the parties herein.

[11] The second respondent though still a party to the reference in the Industrial Court, no longer attended any of the hearings before the third respondent. The appellant, however, remained as a party to the action in view of the joinder application.

[12] The appellant conducted a search on the second respondent and found that the second respondent had been wound up since 2 December 2010 and the official receiver ('OR') had been appointed as its liquidator.

[13] The OR who was present during the hearing on 3 July 2013 before the third respondent took the stand of not contesting the first respondent's claim and had admitted that the first respondent should file her proof of debt.

[14] The hearing proceeded with the remaining parties. The first respondent gave evidence on her case while two witnesses testified for the appellant.

[15] On 16 October 2013, the third respondent allowed the first respondent's claim and awarded the first respondent compensation in the sum of RM40,000 *in lieu* of reinstatement in her former position in the second respondent's employment and 12 months back wages of RM60,000 to be borne by the appellant and second respondent. The written final award of the third respondent is at pp. 31 to 48, bahagian A, jilid 1, RR ("the final award").

[16] Dissatisfied with the said award, the appellant applied for judicial review and prayed for the reliefs enumerated earlier in para. 2.

[17] The learned High Court Judge had on 15 December 2014 dismissed the said application, affirmed the final award of the third respondent and allowed cost of RM5,000 to be paid by the appellant to the first respondent and hence this appeal before us.

The Appeal Before Us

[18] In essence, the appellant's appeal is grounded upon the following broad issues:

(i) there was no nexus between the appellant and the second respondent to render the appellant jointly liable with the second respondent;

(ii) the admission of the second respondent and its absence;

(iii) consideration of unpleaded facts by the third respondent; and

(iv) misapplication of the principles of law on the remedies awarded.

[19] At the onset we agree with learned counsel for the first respondent that the first respondent has established the elements of constructive dismissal before the third respondent which was not challenged by the appellant. There was no evidence both oral and documentaries adduced by the appellant and the second respondent to contradict the evidence of the first respondent. Hence, the first respondent's evidence remained unrebutted and was properly accepted by the third respondent.

[20] The appellant's challenge is merely on the findings of its liability on account that the third respondent has held the appellant to be jointly liable with the second respondent. There is no challenge by the second respondent in respect of the said final award by way of judicial review.

Our Decision

The First Ground – No Nexus

[21] It is the appellant's contention that there is no nexus between the appellant and the second respondent to render the appellant jointly liable with the second respondent. The only relationship between them was a hotel services agreement dated 15 November 2007 whereby the appellant was to manage the second respondent's hotel for a term of 12 months. This agreement has expired. The first respondent considered herself to have been constructively dismissed on 10 March 2007, about two years prior to the said agreement.

[22] The appellant also alluded to cl. 3 of the letter dated 25 May 2009 ("the 25 May 2009 letter") from the second respondent to Boustead Weld Quay Sdn Bhd at pp. 278 to 280, jilid III, bahagian C, RR, which provides:

> 3. Staff Matter
>
> All the existing staff will be terminated by Azrahi on the Cut Off Date. Meanwhile these staff shall be employed by BHR with a salary not lower than the staff's current salary. Azrahi shall pay the staff's salaries on a strictly without prejudice basis calculated up to 26 May 2009. After 26 May 2009, the staff's salaries shall be paid by BHR.

[23] BHR referred in the abovesaid letter is the appellant. The appellant thus argued that based on cl. 3 above, the appellant agreed to accept the transfer of the second respondent's staff only as at 26 May 2009, whereas the first respondent had already been dismissed on 10 March 2007. Hence, the said clause has no effect on the first respondent and the appellant cannot be held liable for the first respondent's constructive dismissal. Additionally it is also not disputed that the appellant had never employed the first respondent.

[24] These same issues were raised before the third respondent. In connection with the same, in the final award the third respondent held as follows at p. 46, jilid 1, bahagian A, RR:

> 33. Peguam Responden juga telah mengutarakan hujah yang sama di dalam Hujahan Bertulis mereka dengan mengatakan tuntutan Yang Menuntut adalah salah dan merupakan 'afterthought'. Ini kerana tidak ada nexus antara Yang Menuntut dengan Responden.
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> 34. Dengan hormatnya Mahkamah menolak hujahan itu. Sebenarnya isu itu telah pun diputuskan oleh Mahkamah dalam Award Interim No. 949 Tahun 2012 semasa Yang Menuntut membuat permohonan untuk mencantumkan responden di bawah s. 29(a) Akta Perhubungan Perusahaan, 1967 dan keputusan ini telah pun dikekalkan oleh Mahkamah Tinggi pada 29.1.2013 apabila Yang Arif Hakim menolak permohonan semakan kehakiman yang difailkan oleh Responden.

[25] In the Interim Award No. 949 Tahun 2012 alluded to above, the third respondent in allowing the first respondent's application under s. 29(a) of the IRA 1967, to join the appellant as a party in the reference had stated at pp. 161-162, jilid III, bahagian C, RR:

> 11. Di sini Mahkamah setuju dengan hujahan peguam Yang Menuntut bahawa dokumen Exhibit 'D' dengan jelas menyatakan hubungan di antara syarikat dengan syarikat yang dicadangkan, iaitu di bawah terma 3:
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> 3. Staff Matter
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> All the existing staff will be terminated by Azrahi on the Cut Off Date. Meanwhile these staff shall be employed by BHR with a salary not lower than the staff's current salary. Azrahi shall pay the staff's salaries on a strictly without prejudice basis calculated up to the 26 May 2009. After 26 May 2009, the staff's salaries shall be paid by BHR.
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> 12. Kandungan terma ini adalah jelas dan dengan sendirinya menolak penyataan affidavit tambahan Encik Azlan Yusof Merican yang menafikan Yang Menuntut adalah seorang pekerja kepada Boustead Hotel.

Note: The document exh. 'D' and its cl. 3 referred to above by the third respondent is the same letter and cl. 3 alluded to earlier in para. 22.

[26] It is apparent that the issue in respect of the nexus between the appellant and the second respondent has been ventilated and resolved during the hearing of the same before the third respondent. The third respondent in the final award had rejected the appellant's contention and ruled that the issue of nexus had been resolved *vide* the interim award pursuant to an application by the first respondent to join the appellant in the proceeding under s. 29(a) of the IRA 1967. The third respondent in the interim award had correctly

identified the relevant evidence which is the provision in the letter dated 25 May 2009 relating to staff matters which clearly establish the nexus between the appellant and the first and second respondents.

[27] The said interim award was affirmed by the High Court *vide* order evinced at pp. 295-296, bahagian C, jilid III, RR. This order by the High Court offered a finality of the issue as no further appeal was mounted by the appellant against the said order of the High Court. We could find no error by the third respondent in coming to the said finding.

[28] The interim award was binding and effective upon the appellant by virtue of s. 32(1)(a) of the IRA 1967. It is no longer a competent issue to be reventilated during the hearing of the said reference before the third respondent (in Reference No. 7/4-1905/07).

[29] The learned High Court Judge in the appellant's application for judicial review of the third respondent's final award was in agreement with the third respondent when the same issue was raised. Her Ladyship stated in her grounds of judgment at p. 542, rekod rayuan tambahan ('RRT'):

> 11.7. The 3rd Respondent had ruled that the above term clearly showed that the 1st Respondent was the employee of the Applicant (see *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil s/o Pareira & Ors* (1996) 4 CLJ 747; *Hochtiaf Gammon v. Industrial Tribunal, Bhubaneshwar, Orissa And Ors* AIR (1984) SC 1746.
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> 11.8. The joinder application had been heard and decided by the 3rd Respondent with the Interim Award No. 949/2012 having been made. The very issue was ventilated in the judicial review application which was dismissed by the Court. In view of the fact the Applicant did not pursue an appeal against the decision of the High Court dated 29th January 2013, this issue could not be re-ventilated before the 3rd respondent during the hearing of the case. The Applicant having been joined as a party should be bound by the Award in respect of liability. Therefore, it is not opened to the Applicant to mount similar attack on the said Interim Award.

[30] We are in complete agreement with the learned judge. The third respondent has properly identified the proper parties necessary to be made parties in the proceedings in order to come to an effective and enforceable award. The appellant was joined as a party by virtue of the 25 May 2009 letter wherein the appellant has clearly admitted that they have taken over liability of the second respondent's employees effective 26 May 2009, ie, the cut off date - see *Co-operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals* [2004] 1 CLJ 849. Although the first respondent considered herself to have been constructively dismissed on 10 March 2007, on the cut off date (26 May 2009), her case was still pending before the Industrial Court and her claim for constructive dismissal has yet to be determined by the Industrial Court. Verily, the first respondent has established her nexus with the appellant.

[31] We have no reason to intervene with the findings of the third respondent on account that the grounds relied upon by the third respondent were firmly supported by the evidence adduced. We would interfere only if the findings were grounded on illegality or plain irrationality - see *Petroliam Nasional Berhad v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625. We found none of these and equally found no basis to reopen the issue (of nexus) which had been determined with an award being handed down.

The Second Ground - Second Respondent's Absence And Admission

[32] The appellant next submitted that the OR of the second respondent had made an admission of the second respondent's claim but the third respondent had failed to consider the same but held that the appellant was jointly liable with the second respondent. The second respondent should be held solely liable on account of the said admission. The appellant had also disputed the status of the second respondent and claimed that there were no documents to prove the existence of the winding up order against the second respondent.

[33] The record shows that the OR had represented the second respondent in the reference before the third respondent. On 2 July 2013 the OR had appeared before the third respondent and intimated that they were not contesting the second respondent's claim and that the first respondent may file her proof of debt.

[34] However, we agree with the learned judge that although the OR had taken the stand not to contest the first respondent's claim, it did not absolve the appellant's liability as the third respondent had ruled that the appellant should be joined as a party to the proceedings and hence, both the second respondent and the appellant are to be jointly liable to satisfy any award handed down against any of them.

[35] Additionally the appellant did not appeal against the order of the High Court in the said judicial review application affirming the decision of the third respondent allowing the first respondent's application to join the appellant as a party in the reference. As such the said order of the High Court (dated 29 January 2013, at pp. 295-296, bahagian C, jilid III, RR) remained valid and effective. Therefore, the second respondent's admission or its absence is not an issue capable of invalidating the final award made by the third respondent against the appellant.

The Third Ground - Consideration Of Unpleaded Facts

[36] The appellant submitted that the first respondent has failed to plead her last drawn salary in her statement of case (at pp. 93 to 99, jilid III, bahagian C, RR) and hence, has departed from her pleaded case. The record shows that the first respondent had introduced evidence of her last drawn pay at RM5,000 per month *vide* exh. CL-2 dated 1 October 2002 in the course

of the hearing before the third respondent and was admitted by the third respondent over the objections of the appellant on account that it was introduced only recently.

[37] However, in our view the first respondent had pleaded in her statement of case that she should be reinstated in her former position without, amongst others, any loss of salary. In such event, the first respondent is entitled to introduce evidence of her last drawn salary. The said exh. CL-2 could not have been an afterthought as it was dated 1 October 2002, long before she considered herself to have been constructively dismissed on 10 March 2007.

[38] Learned counsel for the appellant was given the opportunity to cross-examine the first respondent over the production of the said exh. CL-2 at that stage. As such the appellant would not have suffered any prejudice nor caught by surprise as it has always been the pleaded case of the first respondent to be reinstated in her former position without loss of salary, position or seniority, which invariably behoves upon her to prove her last drawn salary.

[39] In the final award, the third respondent noted, at p. 47, jilid 1, bahagian A, RR:

> 39. Yang menuntut mengatakan gajinya adalah RM5000.00 semasa dibuang kerja. Ini dibuktikan dengan Eksibit CL-2, surat bertarikh 1.10.2002 yang ditandatangani oleh Pengarah Urusan Syarikat. Peguam Responden telah membantah exhibit itu kerana baru dikemukakan. Beliau telah merujuk kes *Ong Yoke Eng v. Lim Ah Ye* (1982) 1 MLJ 226.
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> 38. Bagaimanapun Mahkamah menolak bantahan itu dan bersetuju dengan hujahan peguam Yang Menuntut bahawa peguam Yang menuntut (should be the respondent) telah diberi peluang untuk menyoalbalas saksi dan tidak timbul isu "surprise" atau "prejudice" seperti yang diputuskan dalam kes di atas.

[40] We have no quarrel with the approach taken by the third respondent. Indeed, it is consistent with the provision of s. 30(6) of the IRA 1967, the objective of which is to facilitate the settling of trade dispute or the reference under s. 20(3) of the same. Hence it behoves upon the Industrial Court not to be too legalistic in reading into the pleadings of the parties appearing before them. In fact they are enjoined to be guided always by equity and good conscience as envisaged by s. 30(5) of the IRA 1967.

The Fourth Ground - Misapplication Of Established Laws On Remedies

[41] The attack under this ground were two pronged.

[42] The third respondent found that the first respondent cannot be reinstated due to her age, which was 58 years old at the time the final award was handed down - para. 36, p. 47 jilid 1, bahagian A, RR.

[43] Learned counsel for the appellant thus submitted that based on the Federal Court judgment in *Unilever (M) Holdings Sdn Bhd v. So Lai & Anor* [2015] 3 CLJ 900, the first respondent cannot be compensated if the workman is not eligible to be reinstated in the first place at the time of the award. The Federal Court in the aforesaid case held, at para. 20, p. 912:

> [20] From the phrase 'compensation *in lieu* of reinstatement', it is our judgment that the element of compensation will only arise when the employee is in a position or situation to be reinstated. It is a condition precedent to such compensation. Our view is fortified by the clear provision of s. 20(1) of the IRA 1967, where the primary remedy of such a representation to the Director General is for the workman 'to be reinstated in his former employment'. If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise. Corollary to that logic, it cannot be *in lieu* of his reinstatement ...

[44] In response to the same, learned counsel for the first respondent has graciously conceded that the judgment in *Unilever (M) Holdings Sdn Bhd v. So Lai* (*supra*) does disentitle the first respondent from compensation *in lieu* of reinstatement as the first respondent had surpassed the contractual retirement age of 55 at the time the final award was handed down by the third respondent.

[45] We agreed with the position of the law as submitted by the appellant's learned counsel and conceded by learned counsel for the first respondent. Hence, without more we allowed the appellant's appeal in respect of the award in the sum of RM40,000 for compensation *in lieu* of reinstatement handed down by the third respondent and affirmed by the learned High Court Judge. We thus quashed the said award.

[46] The other complaint by the appellant's learned counsel was the contention that there was no legal basis for the back wages awarded by the third respondent to the first respondent.

[47] The third respondent in the final award accepted that the first respondent earned RM5,000 per month prior to her dismissal and had 24 months to go before her retirement at the time of dismissal.

[48] The third respondent had awarded 12 months back wages amounting to RM60,000 (12 x RM5,000 = RM60,000) to the first respondent. On the evidence that the first respondent had established her case of being constructively dismissed, the third respondent was verily correct in awarding the said award for back wages.

[49] In awarding the said award, the third respondent had acted in accordance with para. 1 of the Second Schedule of s. 30(6A) of the IRA 1967, which states that back wages shall not exceed 24 months. The quantum of

the award is most reasonable. It might well be worthy to note that a reduction of 50% was made from the back wages which is the maximum deduction allowed under Practice Note 1 of 1987.

[50] On the present facts, the third respondent did not err in allowing the said claim for back wages. In *Unilever (M) Holdings Sdn Bhd* (*supra*) the award for back wages was allowed. It was only the compensation *in lieu* of reinstatement that was quashed. The first respondent had 24 months to go before her retirement at the point of dismissal. The 12 months back wages was thus within the third respondent's empowerment to award.

[51] We were in full agreement with the learned High Court Judge that under s. 30(5) of the IRA 1967, the third respondent is vested with a wide discretion to award damages and/or compensation once it was proven that the first respondent was constructively dismissed by the appellant. On facts and evidence, we could find no reason to interfere with the finding of the third respondent and the affirmation by the learned High Court Judge that the second respondent indeed had constructively dismissed the first respondent. The appellant, having been joined as a party, is equally liable for such act by the second respondent.

Conclusion

[52] Hence, we allowed the appellant's appeal only in respect of the award of compensation *in lieu* of reinstatement amounting to RM40,000 awarded by the third respondent, which obviously cannot hold water in the light of the decision in the *Unilever* case. We, however, were unanimous in our findings that the first respondent is entitled for the claim for back wages.

Accordingly

[53] The appeal of the appellant against the decision of the High Court on 15 December 2014 is allowed in part. The award for compensation *in lieu* of reinstatement is quashed and the award for 12 months back wages is affirmed. There shall be no order as to cost and the deposit is to be refunded to the appellant.